Supreme Court, U.S.
FILED
JAN 23 2002
CLERK

(9)

No. 00-10666

In the Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE THE CATO INSTITUTE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Given that a finding of "brandishing", as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amicus Curiae the Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited, constitutional government. The Cato Institute has a substantial interest in supporting the position of the petitioner in order to uphold the constitutional rights of a criminal defendant to be informed of charges in an indictment and to be tried by an impartial jury. The Cato Institute believes that redefining crimes as sentencing factors undermines the intended role of the jury as a bulwark of American liberty.

Amicus Curiae the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with more than 10,400 members nationwide--along with 80 state and local affiliates with 28,000 members--including private defense lawyers, public defenders and law professors. NACDL's mission is to promote the study of criminal law and practice; to encourage the integrity, independence and expertise of criminal defense lawyers; and to strengthen our adversary system of justice. Founded in 1958, NACDL has a long tradition of safeguarding the rights of persons involved in the criminal justice system, including the right to jury trial.

Amici Curiae submit this brief with the consent of the parties.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amici Curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Section 924(c)(1)(A) of Title 18, U.S. Code, provides that any person who, during and in relation to the commission of certain predicate offenses, "uses or carries a firearm," shall be sentenced to not less than 5 years imprisonment; "if the firearm is brandished," the minimum is 7 years, and if discharged, the minimum is 10 years.

"Brandish" means to display "or otherwise make the presence of the firearm known to another person, in order to intimidate that person." § 924(c)(4). Such mens rea and acts are elements of a crime which typically are found by juries. Such specification is unnecessary for a judge considering particular facts at sentencing.

The text and structure of § 924(c)(1)(A) make clear that brandishing is an offense. As in *Castillo v. United States*, 530 U.S. 120, 124 (2000), brandishing is in the same sentence as the "uses" offense. The offenses are in subparagraphs, but the carjacking offenses in *Jones v. United States*, 526 U.S. 227, 232-33 (1999), are similarly structured. Such concise draftsmanship makes it unnecessary to repeat all of the basic elements for each aggravated offense.

As in prior § 924(c)(1), the first part states offenses and the latter concerns sentencing matters. Subpart (A) does not refer to a "conviction," unlike the following subparts. Section 924(c)(1)(D)(i) prohibits probation for "any person *convicted* of a violation of this subsection," obviously referring in part to (A).

Also identically structured is § 924(j), which provides that causing death in a subsection (c) violation, "if the killing is a murder," may be punished by death, and otherwise "if the killing is manslaughter." Yet finding murder is obviously not a

mere sentencing function.

Identically-structured provisions must be interpreted consistently as a matter of due process. The right to notice precludes the linguistic anarchy inherent in construing statutes with identical structures to mean one thing here and the opposite elsewhere, based on factors not seen on the face of the statute.

Brandishing is as typical a crime in Anglo-American history as one could imagine. It requires a finding of the specific intent to make a firearm known to another to intimidate, matters that a jury would ordinarily find. Brandishing is punishable either as a named crime or an aggravated assault under the laws of every State.

That this may be the first federal statute to criminalize brandishing does not make it a sentencing factor. That argument could be made about every new federal crime when first enacted since the beginning of the federal criminal code. Parallel with brandishing, § 924(c) criminalizes a firearm's discharge, which is an element of numerous federal crimes.

As in *Castillo*, "to ask a jury, rather than a judge, to decide whether a defendant [brandished a firearm] would rarely complicate a trial or risk unfairness." 530 U.S. at 127. The jury would determine whether a firearm was brandished in the course of deciding if it was "used." Whether the firearm was brandished may also bear on the jury's determination of whether it was used "during and in relation to" a predicate offense.

To the extent any uncertainty remains, § 924(c) must be interpreted according to the rules of lenity and of constitutional doubt. Both require that brandishing be treated as a element to be found by the jury.

If uncertainty exists, "we would assume a preference for traditional jury determination of so important a factual matter."

Castillo, 530 U.S. at 131. The rule of lenity requires that ambiguous criminal statutes be construed in favor of the accused. The test is whether Congress has "plainly and unmistakably" enacted the harsher alternative, *United States v. Bass*, 404 U.S. 336, 348-49 (1971), which it did not do here.

The rule of constitutional doubt requires that brandishing and discharge be considered as elements of the offense. A "crime" cannot be construed as a "sentencing factor" so as to undercut the jury functions guaranteed in U.S. Const., Art. III, § 2, ¶ 3, and amendts. V & VI. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones*, 526 U.S. at 239.

Constitutional doubt exists here as to whether facts requiring an increased mandatory minimum sentence must be found by the jury, while in *Jones* doubt existed as to whether facts requiring an increased maximum sentence must be found by the jury. The latter issue was resolved in favor of the jury in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986), upheld a State sentencing factor requiring a minimum 5-year sentence, which was lower than the 10 and 20 year maximums for the actual offense. Since amended § 924(c) imposes only minimums and authorizes life imprisonment for every offense, it breaks out of the *McMillan* paradigm. But this Court need not consider whether *McMillan* no longer preserves the basic constitutional values at stake, for brandishing is easily construed as an element.

"It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

Apprendi, 120 S. Ct. at 2363. The underlying premises would also apply to facts which increase mandatory minimum penalties. The essence of a crime is that "the law threatens certain pains if you do certain things . . . ." *Id.* at 2356. That evokes the Constitution's indictment and jury requirements. This is particularly true of specific intent crimes like brandishing: "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" *Id.* at 2364. The legislature cannot define and punish a crime, but remove it from the jury's purview by referring to it as a sentencing factor. But these constitutional doubts need not be resolved here, since brandishing is so easily construed as a element of the offense.

None of the above is changed by arguments about legislative history, which can never override the rules of lenity and of constitutional doubt. Further, the legislative history makes clear that brandishing was considered to be a crime.

ARGUMENT

I. THE TEXT AND STRUCTURE OF § 924(c) ESTABLISH THAT BRANDISHING IS AN ELEMENT OF THE OFFENSE

"The language of the statute [is] the starting place in our inquiry . . . ." *Staples v. United States*, 511 U.S. 600, 605 (1994). Section 924(c)(1)(A) of Title 18, U.S. Code, as amended by P.L. 105-386, 112 Stat. 3469 (1998), provides in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a

court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Subpart (B) provides for 10 and 30 year minimum sentences if the firearms are of certain specified types. For a subsequent conviction, subpart (C) requires a 25 year minimum sentence, and life imprisonment if the firearm is of certain types. Subpart (D) prohibits probation for a person so convicted.

Section 924(c)(4) provides:

> For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

The fact that Congress defined brandishing, carefully wording both the mens rea and acts required, demonstrates that brandishing is an aggravated crime. This is the type of definition typically given as a jury instruction, along with the admonition that each and every element must be proven beyond a reasonable doubt. A definition is unnecessary if brandishing

is a mere sentencing factor – the judge simply considers the particular facts without being bound by whether each and every one of the above elements are present.

The text and structure of § 924(c)(1) make clear that brandishing is an offense. As in *Castillo v. United States*, 530 U.S. 120, 124 (2000), "the first part of the opening sentence clearly and indisputably establishes the elements of the basic federal offense of using or carrying a gun during and in relation to a crime of violence." Further, "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence," *id.* at 124-25, just has here terms such as "use" and "brandish" are in the same sentence and are separated by mere semicolons. Although former § 924(c)(1) was "not broken up with dashes or separated into subsections," *id.*, the amended version has one dash and three subparagraphs. The carjacking statute in *Jones* had numbered subsections making them "look" like sentencing factors, but that "look" was superficial. *Id.*, quoting *Jones v. United States*, 526 U.S. 227, 232-33 (1999).

Defining the basic and aggravated crimes and stating the corresponding penalties is clear and concise draftsmanship. First the basic offense is defined and penalized (totaling 125 words). The two "if" clauses introducing the brandishing and discharge offenses define aggravated crimes and punish them (totaling 19 and 18 words respectively). By using "if" instead of repeating all of the elements of the basic offense, economy of words is achieved over tedious repetition. Similarly, the term "if" is used to introduce subpart (B), which defines aggravated offenses involving specified firearm types, once again being concise rather than repeating all of the basic offense elements. No rule of statutory drafting requires senseless reiteration of the same elements over and over.

Both the basic and the aggravated offenses alike are in

the present tense: "uses or carries," "possesses," "if the firearm is brandished," "if the firearm is discharged," "if the firearm . . . is a short-barreled rifle" or other specified type. The present tense ties together each element in a moment in time to complete the offense. A sentencing factor may more likely be in the past tense, since the judge is looking at a past event.

The following aspects of prior § 924(c) continue to apply here:

> The next three sentences of § 924(c)(1) . . . refer directly to sentencing: the first to recidivism, the second to concurrent sentences, the third to parole. These structural features strongly suggest that the basic job of the entire first sentence is the definition of crimes and the role of the remaining three is the description of factors (such as recidivism) that ordinarily pertain only to sentencing.

Castillo, 530 U.S. at 125. Similarly, with amended § 924(c)(1), subpart (C) concerns recidivism[2] and subpart (D) concerns the same probation and concurrent-sentence prohibitions as before.

Amended § 924(c)(1) has further language not found in the prior version. While subpart (A) proscribes acts such as "using" and "brandishing," it does not refer to a "conviction." By contrast, subpart (B) begins, "If the firearm possessed by a

[2] This case does not concern whether subpart (C)'s reference to "a second or subsequent conviction" is an element or a sentencing factor. Elsewhere, the Gun Control Act treats a prior felony conviction as a element. 18 U.S.C. § 922(g) (felon in possession of firearm); *see Old Chief v. United States*, 519 U.S. 172, 174 (1997). One or more prior convictions were also elements in 18 U.S.C. App. § 1202(a) (repealed 1986). *See United States v. Batchelder*, 442 U.S. 114, 119 (1979).

person *convicted of a violation of this subsection*" is of specified types, and proceeds to impose 10 or 30 year minimums depending on firearm type. Subpart (C) begins, "In the case of a second or subsequent *conviction under this subsection*," and proceeds to impose sentences of 25 years or life. Subpart (A) does *not* begin, "If the firearm possessed by a person convicted of a violation of this subsection was brandished or discharged."[3]

Section 924(c)(1)(D)(i) provides that "a court shall not place on probation any person *convicted* of a violation of this subsection . . . ." (Emphasis added.) Thus, one must be "convicted" of (not just sentenced for) the acts described in "this subsection." "In the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final

[3] Again, use of this language in (B) and (C) does not resolve whether the subjects thereof are elements or sentencing factors. As *Castillo* held, construing firearm types as sentencing factors would raise troublesome issues over what is traditionally a jury function. Moreover, subpart (B) must be read consistently with § 924(o), which unambiguously makes firearm type an element:

> A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

Congress obviously did not entrust the sentencing judge to find facts about firearm types authorizing life in prison.

judgment of conviction." *Deal v. United States*, 508 U.S. 129, 132 (1993).[4]

The fact that § 924 is entitled "Penalties" provides no guidance, for "at least some portion of § 924, including § 924(c) itself, creates, not penalty enhancements, but entirely new crimes." *Castillo*, 530 U.S. at 125. Complete offenses abound throughout § 924, some with structures identical to § 924(c).[5]

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[4] Similarly, *Garrett v. United States*, 471 U.S. 773 (1985), construed 21 U.S.C. § 848(a), which provides enhanced penalties for recidivists engaged in a continuing criminal enterprise. This Court held:

> At this point there is no reference to other statutory offenses, and a separate penalty is set out, rather than a multiplier of the penalty established for some other offense. This same paragraph then incorporates its own recidivist provision, providing for twice the penalty for repeat violators of this section. Significantly the language expressly refers to "one or more prior convictions . . . under this section." Next, subparagraph (2) . . . also refers to any person "who is convicted under paragraph (1) of engaging in a continuing criminal enterprise," again suggesting that § 848 is a distinct offense for which one is separately convicted.

Garrett, 471 U.S. at 780.

§ 849 (now repealed) has "starkly contrasting language which plainly is not intended to create a separate offense": the court sits without a jury to consider prior offenses and determines status as a dangerous special drug offender by a preponderance of evidence. *Id.* at 782.

[5] *E.g.*, § 924(a)(6)(B) (a non-juvenile "who knowingly violates section 922(x)," which prohibits transfer of a handgun to a juvenile, "(i) shall be . . . imprisoned not more than 1 year," "and (ii) if the person sold" the handgun "knowing . . . that the juvenile intended to" use the handgun to commit a violent crime, "shall be . . . imprisoned not more than 10 years . . . ." *See Bryan v. United States*, 524 U.S. 184, 188 (1998) (construing

§ 924(j) is the most dramatic example of Congress' practice of setting forth offense elements in § 924 with a structure identical to that of § 924(c):

> A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall–
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

To construe murder and manslaughter as mere sentencing factors would be a radical departure from due process and the right to jury trial. The courts have held that the reference to murder in § 924(j) is an offense element.[6] Yet under respondent's interpretation of § 924(c), which has the same structure as § 924(j), the jury need only convict a defendant of causing a death through the use of a firearm in the course of a § 924(c) violation, and the court may find at sentencing that the death was murder and impose the death penalty.

Amended § 924(c) is structurally identical both to the prior version construed in *Castillo* and to the federal carjacking

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elements of "willfully" and "knowingly" in § 924(a)).

[6] *United States v. Pearson*, 203 F.3d 1243, 1269-70 (10th Cir. 2000) (jury must find murder in course of § 924(c) violation); *United States v. Harris*, 66 F. Supp. 2d 1017, 1033 (N.D. Iowa 1999) (distinguishing *Jones*, 526 U.S. 227, in that indictment "specifically alleges murder").

statute, 18 U.S.C. § 2119, construed in *Jones*. The following compares the texts of §§ 2119 and 924(c)(1)(A):

18 U.S.C. § 2119	18 U.S.C. § 924(c)(1)(A)
Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, *shall* (1) be fined under this title or imprisoned not more than 15 years, or both, (2) *if* serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and (3) *if* death results, be fined under this title or imprisoned for any number of years up to life, or both.	. . . any person who, during and in relation to any crime of violence or drug trafficking crime . . ., uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, *shall* . . .– (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) *if* the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) *if* the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years. (Italics added.)

In short, whoever commits act A "shall" be sentenced to X, and "if" he commits aggravating act B, "shall" be sentenced to Y. Both *Jones* and *Castillo* held that act B in statutes with this structure is an element of the offense. Other statutes with the same structure must be interpreted the same as a matter of consistent construction and due process. The result cannot vary

depending on, say, how many other statutes make the act a crime or what some member of Congress said on the floor. The criminal law would be a cruel joke if statutes with identical structures may or may not create offense elements depending on obscure circumstances not contained on the face of the statutes. The fundamental rights to notice and due process preclude the linguistic anarchy inherent in construing statutes with identical structures to mean one thing here and the opposite elsewhere.

In sum, the text and structure of § 924(c) makes clear that brandishing is an offense element.

II. BRANDISHING IS A TRADITIONAL CRIME SUBJECT TO DETERMINATION BY JURIES

Brandishing is as typical a crime in Anglo-American history as one could imagine. All of the reasons underlying the right to jury trial support treatment of brandishing as an element of the offense and not as a sentencing factor.

Section 924(c)(4) defines brandishing as a specific intent crime, requiring that a person display or make a firearm known to another "in order to intimidate that person." Statutes ordinarily entrust the determination of a defendant's intent to the jury. *See Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) ("although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not . . . justify shifting the burden to him").

Courts have not "typically or traditionally used firearm types (such as 'shotgun' or 'machinegun') as sentencing factors, at least not in respect to an underlying 'use or carry' crime." *Castillo*, 530 U.S. at 126. "Statutory drafting occurs against a backdrop . . . of traditional treatment of certain categories of important facts." *Id.*, quoting *Jones*, 526 U.S. at 234.

"Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones*, *id.* at 234.

It was an indictable offense at common law to go armed with the intent of committing crimes of violence.[7] Brandishing and discharge of firearms were included within this offense.[8] Such common-law offenses were recognized in the early Republic.[9]

Brandishing and inappropriate discharge of firearms, while labeled differently, are crimes in the laws of every State.[10]

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[7] If any man "Ride[s] Armed covertly or secret with Men of Arms against any other to Slay him, or Rob him, or Take him, or Retain him till he hath made Fine and Ransom . . ., it . . . shall be judged Felony or trespass, according to the Laws of the Land of old time used . . . ." Edward Coke, *The Third Part of the Institutes of the Laws of England* 160 (6th ed. 1680). Carrying arms "malo animo" (with an evil mind) was a crime. *Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K. B. 1686).

[8] An affray was committed "where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law . . . ." William Hawkins, *Pleas of the Crown*, I, 488 (8th ed., London 1824). *See Rex v. Meade*, 29 Times Law Reports 540, 541 (1903) (offense charged was "under the common law," if the defendant was "firing a revolver in a public place, with the result that the public were frightened or terrorized").

[9] *State v. Huntley*, 25 N.C. (3 Iredell) 284 (1843) (defendant exhibited "dangerous and unusual weapons" and declared intent to kill). *Cf. Simpson v. State*, 13 Tenn. (5 Yerg.) 356, 358-60 (1833) (indictment for affray insufficient unless it alleges fighting in a public place).

[10] *See* "State Firearms Laws," App. A (heading "Miscellaneous" for each State), in Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice* (New York: Clark Boardman Callaghan/West Group, 1995, supp. 2001).

Many State statutes prohibit brandishing or pointing *per se*,[11] some define assault-type offenses to encompass those terms,[12] and others simply punish acts of brandishing under general assault statutes.[13] Brandishing may be an aggravation of another violent crime.[14] Brandishing is an element to be found

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[11] *E.g.*, Va. Code Ann. § 18.2-282.A (2001) ("It shall be unlawful for any person to point, hold or brandish any firearm . . . in such manner as to reasonably induce fear in the mind of another"). *See also* Conn. Gen. Stat. § 53-206c(c) (2001); Idaho Code § 18-3304 (2000); Burns Ind. Code Ann. § 35-47-4-3 (2001); Mich. CLS § 750.234e(1) (2001); Minn. Stat. § 609.66 Subd. 1(a) (2000); NY CLS Penal § 265.35.3 (2001); S.C. Code Ann. § 16-23-420(B) (2000); 13 V.S.A. § 4011 (2001); Wis. Stat. § 941.20(1) (2000).

[12] *E.g.*, Iowa Code § 708.1 (2001) ("A person commits an assault when, without justification, the person does any of the following: . . . 3. Intentionally points any firearm toward another"). *See* MCLS § 750.329 (2001); Minn. Stat. § 609.713 Subd. 3(a) (2000); Mont. Code Anno., § 45-5-213(1) (2001); N.J. Stat. § 2C:12-1.b(4) (2001); W. Va. Code § 61-7-11 (2001); Wyo. Stat. § 6-2-504(b) (2001).

[13] *E.g.*, *Brown v. State*, 166 Ga. App. 765, 305 S.E.2d 386, 387 (1983) ("he deliberately got the gun and brandished it at his wife in order to scare her, thus committing an aggravated assault").

[14] *E.g.*, Ohio RC Ann. § 2911.01 (Anderson 2001) ("Aggravated robbery. (A) No person, in attempting or committing a theft offense, . . . shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it").

by the jury.[15]

Just as the use of a pistol and a machinegun "is great, both in degree and kind," and "numerous gun crimes make substantive distinctions between" such weapons, *Castillo*, 530 U.S. at 126-27, brandishing and discharge are aggravated crimes compared with less serious but unlawful use and carrying of firearms. The difference between these activities "is both substantive and substantial -- a conclusion that supports a 'separate crime' interpretation." *Id.* at 127.

While *Castillo* suggests in dictum that brandishing may also be a sentencing factor, *id.* at 126, so too is use of a firearm in a homicide. U.S. Sentencing Commission, Guidelines Manual § 2K2.1(c)(1)(B). But brandishing and murder remain statutory offenses.

The Fourth Circuit asserted that "Harris has cited no federal statute in which Congress has treated 'brandished' as a separate offense or element of an offense." 243 F.3d at 810. Yet this could be said about every new federal crime when first enacted in the Long March since 1789 of the creation of a federal criminal code.[16] This just happens to be the first time

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[15] *E.g.*, *Kelsoe v. Commonwealth*, 226 Va. 197, 308 S.E.2d 104 (1983) ("There are two elements of the offense: (1) pointing or brandishing a firearm, and (2) doing so in such a manner as to reasonably induce fear in the mind of a victim."). *See Nantz v. State*, 740 N.E.2d 1276, 1283 (Ind. App. 2001); *State v. Tate*, 54 O.S.2d 444, 446, 8 O.O.3d 441, 377 N.E.2d 778 (1978).

[16] The only federal crimes explicitly authorized by the Constitution concern such matters as counterfeiting and piracy on the high seas. U.S. Const., Art. I, § 8. It would be a double stretching of the Constitution to argue that each new offense created by Congress to appear tough on what has long been a State crime is not triable by jury but is only a sentencing factor.

Congress made brandishing an element of a crime. Parallel with brandishing, § 924(c) also makes discharge a crime, and discharge may be found as an element of numerous federal crimes. *See* Brief for Petitioner.

In addition to traditional treatment as a crime, *Castillo* postulates the parallel traditional preference for fact finding by the jury. To paraphrase, "to ask a jury, rather than a judge, to decide whether a defendant [brandished a firearm] would rarely complicate a trial or risk unfairness." 530 U.S. at 127 . "As a practical matter, in determining whether a defendant used or carried a 'firearm,' the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used." *Id.* at 127-28. These circumstances include brandishing.

Inherent in the jury function of determining "uses or carries" is the finding of *how* a firearm was used. *See Bailey v. United States*, 516 U.S. 137, 148 (1995) (resolving "what evidence is required to permit a jury to find that a firearm had been used at all"). It would be illogical to conclude that Congress intended that the jury must determine whether a firearm was used, but not whether this use included brandishing or discharge.

Whether the firearm was brandished or discharged may also bear on the jury's determination of whether it was used or carried "during and in relation to" a predicate offense. Transforming brandishing or discharge into a sentencing factor "might unnecessarily produce a conflict between the judge and the jury," particularly when "the sentencing judge applies a lower standard of proof" and "additional years in prison are at stake." *Castillo*, 530 U.S. at 128.

In sum, brandishing is a traditional crime which is subject to determination by the jury, not the sentencing judge.

III. THE RULES OF LENITY AND CONSTITUTIONAL DOUBT REQUIRE THAT BRANDISHING BE TREATED AS AN ELEMENT

To the extent any uncertainty remains, § 924(c) must be interpreted according to the rules of lenity and of constitutional doubt. Both require that brandishing be treated as a element to be found by the jury.

To paraphrase *Castillo*, "the length and severity of an added mandatory sentence that turns on the presence or absence of [brandishing or discharge] weighs in favor of treating such offense-related words as referring to an element." 530 U.S. at 131. Here, the 5-year sentence increases to 7 years for brandishing and 10 years for discharge. If uncertainty exists, "we would assume a preference for traditional jury determination of so important a factual matter." *Id.* The "rule of lenity requires that 'ambiguous criminal statutes . . . be construed in favor of the accused.'" *Id.*, quoting *Staples*, 511 U.S. at 619 n.17. Like the more dangerous firearms in *Castillo*, brandishing "refer[s] to an element of a separate, aggravated crime." *Id.*

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson v. United States*, 435 U.S. 6, 15 (1978); *accord*, *Busic v. United States*, 446 U.S. 398, 405-06 (1980) (both construing § 924(c)). The test is whether Congress has "plainly and unmistakably" enacted the harsher alternative, *United States v. Bass*, 404 U.S. 336, 348-49 (1971), which it

obviously did not do here.[17]

Moreover, the rule of constitutional doubt requires that brandishing and discharge be considered as elements of the offense. A "crime" cannot be construed as a sentencing factor so as to undercut the requirements that "the trial of all crimes . . . shall be by jury," U.S. Const., Art. III, § 2, ¶ 3, or that "[i]n all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation." *Id.* Amend. VI. Blackstone, *Commentaries* *380, explained the policy behind the right to jury trial as follows:

> But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in . . . . This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice . . . .

Trial by jury is secure only "so long as this palladium remains sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations, which may sap and

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[17] *Bass* explained why "doubts are resolved in favor of the defendant" as follows:

> First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. at 347-48 (citations and quotation marks omitted).

undermine it; by introducing new and arbitrary methods of trial . . . ." *Jones*, 526 U.S. at 246, quoting 4 Blackstone, *Commentaries* *342-344.[18]

Reflecting this tradition, John Marshall noted at the Virginia ratification convention in 1788:

> What is the object of a jury trial? To inform the court of the facts. . . . I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury.

III Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 557-58 (1836).

Also implicated is the requirement in U.S. Const. Amend. V that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . , nor be deprived of life, liberty or property, without due process of law . . . ." "The grand jury performs most important public functions; and, is a great security to the citizens against vindictive prosecutions . . . ." Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 390 (1840).

The term "crime," a fundamental concept in the Constitution's vocabulary, has an objective meaning and is assuredly not just anything the legislature or a court says it is

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[18] "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The jury guarantee reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id. See United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

(or is not).[19] When what is really a "crime"is declared by the legislature or construed by the judiciary to be a sentencing factor, the power of the grand jury to accuse (or not accuse) a person of crime and of the petit jury to try the person is shifted to the judiciary. Yet the jury is just as much a constitutional decision maker as are the other branches of government, and its power cannot be usurped by word smithing.

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones*, 526 U.S. at 239 (citations omitted). Under this rule, brandishing and discharge must be interpreted as offense elements which must be charged in the indictment and proven to the jury beyond a reasonable doubt.

This case is in the same posture as was *Jones*, in that constitutional doubt exists here as to whether facts requiring an increased mandatory minimum sentence must be found by the jury, while in *Jones* doubt existed as to whether facts requiring an increased maximum sentence must be found by the jury.[20]

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[19] Notes *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978):

> This recalls Lewis Carroll's classic advice on the construction of language: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean–neither more nor less.'"

[20] *Jones*, 526 U.S. 243 n.6, explained the principle as follows:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our

The latter issue was resolved in favor of the jury in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

To begin with, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This burden cannot be avoided by judicially redefining a crime as a sentencing factor.

Mullaney v. Wilbur, 421 U.S. 684, 686 & n.3 (1975), invalidated a murder statute providing that malice is presumed on proof of intent to kill resulting in death, except that the crime is manslaughter if defendant proves provocation in the heat of passion. The rebuttable presumption relieved the State of its due process burden to prove every element of the crime beyond a reasonable doubt. *Mullaney* stated:

> Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Id. at 697.

Patterson v. New York, 432 U.S. 197, 205-06 (1977), upheld a definition of murder as causing death with intent, subject to an affirmative defense of extreme emotional disturbance. There was no presumption of malice, and at

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concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

common law the prosecution need not disprove beyond a reasonable doubt every fact constituting an affirmative defense. *Id.* at 202, 210-11. The Court noted:

> This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.

Id. at 210. This is open to the broad reading that "the State lacked the discretion to omit 'traditional' elements from the definition of crimes and instead to require the accused to disprove such elements." *Jones*, 526 U.S. at 241-42.

Underlying *Winship*, *Mullaney*, and *Patterson*, regardless of how each case resolved the burden shifting, is the premise that the jury determines all of the pertinent facts. By contrast, transforming an element into a sentencing factor completely removes the fact finding from the jury.

McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986), upheld a State statute imposing a minimum 5-year sentence where the court finds the fact of visible possession of a firearm at sentencing by a preponderance of evidence. The enhancement was lower than the 20- and 10-year maximum sentences authorized for the actual offenses, and thus "the statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. The claim that visible possession is really an offense element "would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, . . . but it does not." *Id.*

Since amended § 924(c) imposes only minimums and authorizes life imprisonment for every offense, it breaks out of the *McMillan* paradigm altogether. *McMillan* was decided before the Brave New World in which all crimes of a class, from the lowest level to the most aggravated, have the same maximum of life imprisonment. Perhaps the time has come when this Court should consider whether the *McMillan* framework no longer protects the basic constitutional values at stake. But this Court need not do so in this case, for brandishing is easily construed as an element.

Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998), held that recidivism, which is "as typical a sentencing factor as one might imagine," is not an element of the crime of unlawful reentry after deportation under 8 U.S.C. § 1326. By contrast, brandishing (by whatever name) and discharge are prosecuted as crimes in every State in the United States. Moreover, recidivism is rarely contested and may create unfair prejudice with the jury. *Id.* at 235. But in determining whether a firearm was "used," the jury will invariably determine if it was brandished or discharged, which is frequently contested. Finally, unlike other allegations, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249.

Interpretation of aggravated crimes as sentencing factors reduces the jury function to "low-level gatekeeping," i.e., the jury's fact finding necessary for the basic offense with the lowest-level punishment opens the door to a judicial finding sufficient to impose far-higher sentences. *Jones*, 526 U.S. at 243-44. The jury's fact finding for a minimum 5-year sentence here would open the door to a judicial finding triggering minimum 7- and 10-year sentences respectively.

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), held that facts which result in an increase in the maximum punishment must be found by the jury. Its underlying premises would also apply tó facts which increase mandatory minimum penalties. With the exception of the fact of a prior conviction, *Apprendi* endorsed the following: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 120 S. Ct. at 2363, quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring). Justice Stevens added in that concurrence: "a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence . . . ." *Id.* at 253.

Apprendi found the essence of a "crime" to be as follows: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them." *Id.* at 2356, quoting O. Holmes, *The Common Law* 40 (1963).[21] "[T]he procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment." *Id.*

Where a "crime" is concerned, the Constitution repeatedly addresses the role of the grand jury and the petit jury. U.S. Const., Art. III, § 2; Amdts. 5 and 6. *Apprendi* relates about the original intent:

> Any possible distinction between an

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[21] "This case turns on the seemingly simple question of what constitutes a 'crime.'" *Id.* at 2367-68 (Thomas, J., concurring) (quoting Fifth and Sixth Amendment guarantees). "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)." *Id.* at 2369.

> "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.

120 S. Ct. at 2356.

Brandishing includes the specific intent of making the presence of a firearm known to intimidate another, § 924(c)(4), and criminal intent has always been a jury matter. "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" 120 S. Ct. at 2364. The legislature cannot define and punish a crime, but remove it from the jury's purview by referring to it as a sentencing factor:

> [A] State cannot through mere characterization change the nature of the conduct actually targeted. It is as clear as day that this hate crime law defines a particular kind of prohibited intent, and a particular intent is more often than not the sine qua non of a violation of a criminal law.

Id. at 2364 n.18.

The harsher minimum imprisonment and additional blameworthiness also make clear that brandishing is a crime. *Apprendi* states: "Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance." *Id.* at 2365.

Thus, the principles set forth in *Apprendi* apply just as much to increases in mandatory minimum sentences as to increases in the maximum sentence. As Justice Thomas, joined by Justice Scalia, wrote in his concurrence:

> The mandatory minimum "entitles the government" . . . to more than it would otherwise be entitled . . . . Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.

Id. at 2379-80 (Thomas, J., concurring) (citation omitted).

But this case does not require this Court to decide whether *McMillan* has been outmoded by the legislative trick of making all offenses of a type potentially punishable by life imprisonment. "[T]he Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions." *Jones*, 526 U.S. at 251-52. Accordingly, brandishing must be construed as an element of an offense "which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."[22] *Id.*

A final point is in order. According to the Fourth Circuit, the legislative history establishes that brandishing is a sentencing factor. *Harris*, 243 F.3d at 810-11. However, "principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of . . . legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990). Even where there are "contrary indications in the statute's legislative history," a court must "resolve any doubt in favor of the

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[22] Should this Court reach that issue, *amici curiae* suggest that *McMillan* should be overruled for the reasons stated by petitioner and by *Amicus Curiae* Families Against Mandatory Minimums Foundation.

defendant."[23] *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Nor can legislative history override the doctrine of constitutional doubt.

Statutes with identical structures – the two versions of § 924(c) and the statute in *Jones* – cannot be construed differently regarding elements versus sentencing factors based on a court's rendition of legislative history.[24] Under this discordant linguistic methodology, citizens may not rely on uniformity in the language or structure of criminal laws, but are subject to prosecution based on a court's *post hoc* portrayal of "legislative history."

That said, factually the legislative history here makes clear that brandishing was considered to be a crime.[25] Not one

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[23] *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992), (applying rule of lenity); *id.* at 521 (Scalia, J., concurring, joined by Thomas, J.) ("that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history" is "particularly inappropriate in determining the meaning of a statute with criminal application").

[24] *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.) (the fiction that one is presumed to know the criminal law "descends to needless farce when the public is charged even with knowledge of Committee Reports").

[25] *See* House Report 105-344, 105th Cong., 1st Sess., 12 (Oct. 24, 1997) ("To sustain a *conviction* for brandishing or discharging a firearm"); 144 Cong. Rec. H533 (Feb. 24, 1998) (remarks of Rep McCollum) (bill provides that "a crime be the possession or the brandishing or the discharging of the gun"); *id.* at H10329 (Oct. 9, 1998) (remarks of Rep McCollum) (House-Senate compromise bill "clarifies Congress' intent as to the type of criminal conduct which should trigger the statute's application," including "using a gun, possessing in the course of a crime a gun, or certainly brandishing or discharging that gun."); *id.* (remarks of Rep. Scott) (comparing brandishing and discharge penalties "to the penalties for *other crimes*").

proponent cited any need to transform the acts condemned in § 924(c) from elements of the offense to sentencing factors, and not one opponent criticized the bills for usurping the right to jury trial. *See Castillo*, 530 U.S. at 130 ("the 'mandatory sentencing' statements to which the Government points show only that Congress believed that the 'machinegun' and 'firearm' provisions would work similarly").

In sum, the decision below is inconsistent with this Court's teachings on the construction of criminal statutes. This Court has never suggested that legislative history overrides any consideration of the doctrine of constitutional doubt or the rule of lenity, both of which require that brandishing as prohibited in § 924(c) be construed as an offense element.

CONCLUSION

This Court should reverse the judgment of the court of appeals, vacate the petitioner's 7-year sentence, and remand the case for resentencing under 18 U.S.C. § 924(c)(1) to 5 years imprisonment.

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